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July 19, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20024

Subject: In the Matter of Implementation of Pay Telephone Provisions
CC Docket No. 96-128

Dear Madam Secretary:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206, as counsel for Northwest Public Communications Council, we hereby provide you with a notice of a written ex-parte communication in connection with the above-captioned proceeding. On July 18, 2006, the undersigned counsel submitted by electronic mail, the attached message and copy of the amended complaint in *Davel et al. v. Qwest*.

We trust you will find this information to be useful. Should you have any questions or require any additional information, please contact the undersigned counsel directly.

Very truly yours,



Brooks E. Harlow

cc: Ms. Tamara Priess (via e-mail)
Ms. Pamela Arluk (via e-mail)
Ms. Lynne Engledow (via e-mail)
Mr. Christopher Killion (via e-mail)
Ms. Diane Griffin (via e-mail)

Munnerlyn, Carol J.

From: Harlow, Brooks
Sent: Tuesday, July 18, 2006 8:18 AM
To: 'tamara.preiss@fcc.gov'; 'pamela.arluk@fcc.gov'; 'lynne.engledow@fcc.gov';
'Christopher.Killion@fcc.gov'; 'diane.griffin@fcc.gov'
Cc: Aldrich, Robert; 'Kramer, Al'
Subject: Docket CC 96-128, meeting this Thursday

Since referral of *Dave/ et al. v. Qwest* is impending, I thought you might want the opportunity to review a copy of the *Dave/* complaint before our meeting this Thursday afternoon. The amended complaint is attached.

I look forward to seeing you at 2 o'clock on Thursday.



First Amended
Complaint--FINAL...

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., a
Delaware corporation,

Plaintiff,

v.

QWEST CORPORATION, a Colorado
corporation,

Defendant.

Civil No. C-03-3680-P

FIRST AMENDED COMPLAINT FOR
MONEY DAMAGES AND JURY
DEMAND

I. PARTIES

1. Davel Communications, Inc. is a Delaware corporation with its principal place of business located at Cleveland, Ohio. PhoneTel Technologies, Inc., Peoples Telephone Co., Communications Central, Inc., and Teleleasing Enterprises, Inc. are wholly-owned subsidiaries of Davel Communications, Inc. Hereinafter all of these entities and their predecessors in interest will be collectively referred to as Davel Communications, Inc., or plaintiff.

2. Defendant is a Colorado corporation with its principal place of business located at Denver, Colorado. Defendant provides telecommunications services in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

II. JURISDICTION AND VENUE

3. This court has subject matter jurisdiction over defendant under 28 U.S.C. § 1331 because plaintiff's claim arises under the laws of the United States. This court also has subject matter jurisdiction over defendant under 28 U.S.C. § 1337 because plaintiff's claim for damages arise under 47 U.S.C. § 201, et seq. This court also has pendent and supplemental jurisdiction over any state law claims or issues pursuant to 28 U.S.C. § 1367. The court has personal jurisdiction over the defendant because the defendant conducts substantial continuous business in the Western District of Washington. Venue is proper in that part of these claims arose in the Western District of Washington, where the defendant operates, and defendant has ongoing and continuous business contact in the Western District of Washington.

III. FACTS

4. Plaintiff is a Payphone Service provider, who is served by Qwest.

5. Defendant is a telephone company known as a Regional Bell Operating Company ("RBOC") that provides Payphone Services to plaintiff. In addition to providing telephone service to plaintiff, defendant also operates its own payphones through a separate division that competes with plaintiff.

6. The term "Payphone Services" includes Public Access Lines ("PAL") and associated local usage provided by defendant to plaintiff that enable plaintiff to connect its payphones to the telephone network for placement of local and long distance telephone calls.

7. The term "Payphone Services" also includes a service variously called Fraud Protection, CustomNet, Selective Class of Call Screening, or Originating Line Screening ("Fraud Protection") provided by defendant to plaintiff. Fraud Protection is a technology that prevents the billing of certain calls, such as operator-assisted long distance calls, to the payphone from which the call is placed. Fraud Protection is an important payphone service because, in its absence, plaintiff is exposed to billing for calls fraudulently placed from payphones.

1 8. The plaintiff is required to pay defendant for defendant's provision of
2 Payphone Services at the rates set forth in defendant's catalogues, tariffs, and/or price lists
3 ("Price Lists").

4 9. Defendant is regulated by the Federal Communications Commission under
5 the provisions of the Communications Act of 1934, in particular, 47 U.S.C. § 151, et seq.
6 (Chapter 5), governing communications by wire or radio. Chapter 5 requires that defendant's
7 "charges and practices" be "just and reasonable" and that any charge or practice that is "unjust or
8 unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). The FCC is charged with
9 determining what charges and practices are "just and reasonable" under the Communications
10 Act. Id. Chapter 5 also makes it "unlawful" for defendant to "make any unjust or unreasonable
11 discrimination" in charges and practices. 47 U.S.C. § 202(a). Under Chapter 5, defendant is
12 required to comply with FCC orders. 47 U.S.C. § 416.

13 10. In 1996, Congress passed the Federal Telecommunications Act of 1996,
14 which included major revisions and additions to the Communications Act of 1934. Congress
15 added a new section to Chapter 5 to strengthen its prohibitions against discrimination and unjust
16 and unreasonable practices by defendant vis-a-vis its own, and its competitors', provision of
17 payphones. 47 U.S.C. § 276(a). In particular, defendant "shall not prefer or discriminate in
18 favor of its payphone service" after the FCC's adoption of rules to implement Section 276(a).
19 47 U.S.C. § 276(a)(2).

20 11. In carrying out its mandate in Chapter 5 to define and enforce defendant's
21 obligations not to prefer or discriminate in favor of its payphone service and against the payphone
22 services of the plaintiff, the FCC adopted rules that required the defendant to set its Payphone
23 Services rates according to the FCC's "new services test" ("NST") and to file its Payphone
24 Services rates with the utility commissions in all of the states in defendant's territory ("State
25 Commissions"). The FCC also required the defendant to file its Fraud Protection rates with the
26 FCC based on the NST. Defendant was supposed to have NST-compliant PAL and Fraud

1 Protection rates in effect by April 15, 1997. On April 15, 1997, at defendant's request, the FCC
2 granted defendant a conditional waiver of this deadline.

3 12. A condition of the FCC's April 15, 1997 *Bureau Waiver Order* required
4 the defendant to pay a refund to entities like the plaintiff where the defendant's new Payphone
5 Services rates exceeded the defendant's old rates for the services. *See Order*, 12 FCC Rcd. 21,
6 370 at ¶ 2 ("*Bureau Waiver Order*"). The waiver permitted defendant to collect hundreds of
7 millions of dollars of compensation from long distance companies under 47 U.S.C. § 276(b)
8 even though defendant had not yet complied with certain requirements of Section 276(a),
9 including filing NST-compliant Payphone Services rates. The FCC accepted that defendant's
10 commitment to make refunds would compensate the plaintiff for all overcharges from April 15,
11 1997 to the date the NST-based Payphone Services rates became effective. The defendant
12 agreed to provide this refund in an April 10, 1997 letter to the FCC, as an inducement to cause
13 the FCC to grant the waiver request.

14 13. From 1997-2002, the defendant refused to file Payphone Services rates in
15 the states within its territory that were consistent with the NST in violation of FCC orders.
16 Defendant also refused to file a Fraud Protection rate with the FCC in violation of FCC orders.
17 Defendant's failures to file NST-compliant rates violated several provisions of Chapter 5 of the
18 Communications Act, including 47 U.S.C. §§ 201, 202, 276(a), and 416.

19 14. Starting in 2002, defendant began to file new Payphone Services rates that
20 are purportedly compliant with the NST. These new rates, which were substantially lower,
21 establish that Qwest's Payphone Services rates in effect since April 15, 1997 did not comply
22 with the NST. Accordingly, absent a refund as required by the Waiver Order, defendant will
23 have discriminated against plaintiff in violation of 47 U.S.C. §§ 202, 276(a)(2), and 416.
24 Defendant's failure to pay refunds as it agreed and was ordered to by the FCC also constitutes an
25 unjust and unreasonable practice in violation of 47 U.S.C. § 201. Now that new, NST-compliant
26 rates are in effect, the plaintiff is entitled to refunds for Payphone Services overcharges.

1 15. The plaintiff is entitled to PAL and Fraud Protection refunds in Colorado,
2 Idaho, Iowa, Minnesota, Nebraska, New Mexico, North Dakota, South Dakota, Utah,
3 Washington, and Wyoming, based on a calculation of the difference between the rates paid for
4 those Payphone Services from April 15, 1997 to the effective dates of the new state rates and the
5 rates plaintiff would have paid under the new state rates that should have been in effect on
6 April 15, 1997.

7 16. Further, because defendant failed to file a NST-compliant Fraud
8 Protection rate with the FCC in 1997, defendant discriminated against plaintiff in violation of
9 47 U.S.C. §§ 202, 276(a)(2), and 416. Defendant's failure to file as ordered by the FCC also
10 constitutes an unjust and unreasonable practice in violation of 47 U.S.C. § 201. Plaintiff was
11 damaged by defendant's failure to file a tariff for Fraud Protection with the FCC containing rates
12 based on a calculation of the difference between the rates paid under the state tariffs from
13 April 15, 1997 to the effective date of the new FCC tariff and the rate under the new FCC tariff.
14 The defendant thus owes the plaintiff refunds for Fraud Protection overcharges.

15 **IV. FIRST CAUSE OF ACTION**
16 **CLAIM FOR DAMAGES UNDER 47 U.S.C. §§ 206, 207, and 407**

17 17. Plaintiff incorporates and restates the foregoing paragraphs of this
18 Complaint.

19 18. 47 U.S.C. § 201 requires the defendant to implement charges, practices,
20 classifications, and regulations in a just and reasonable fashion. 47 U.S.C. §§ 202.
21 Section 276(a) prohibits the defendant from giving its payphone operations preferential treatment
22 or from discriminating against the plaintiff in favor of itself. 47 U.S.C. § 416 requires the
23 defendant to comply with FCC orders. These sections, §§ 201, 202, 276(a), and 416, constitute,
24 in combination with the FCC's *Bureau Waiver Order*, an express statutory right to fair
25 compensation for defendant's violations.
26

1 19. The defendant's failure to comply with the FCC's *Bureau Waiver Order*
2 and institute and employ the NST and pay plaintiff the statutorily mandated refunds constitute
3 unlawful discrimination and unreasonable and unjust charges, practices, classifications, and
4 regulations.

5 20. Despite the fact that defendant's old rates exceeded the new rates it has
6 finally filed in purported compliance with the NST, defendant has not issued a refund to the
7 plaintiff for the overcharges under the non-compliant rates from April 15, 1997 to the
8 implementation of the new rates. This failure violates the FCC's *Bureau Waiver Order* and
9 47 U.S.C. §§ 201, 202, 276(a), and 416.

10 21. Under 47 U.S.C. §§ 206, 207, and 407, defendant is liable to plaintiff, who
11 is entitled to bring suit to recover damages for defendant's acts and omissions in violation of
12 various provisions of Chapter 5 of the Communications Act.

13 **V. SECOND CAUSE OF ACTION**
14 **IMPLIED RIGHT OF ACTION UNDER 47 U.S.C. §§ 201, 202, 276(a), and 416**

15 22. Plaintiff incorporates and restates the foregoing paragraphs of this
16 complaint.

17 23. 47 U.S.C. §§ 201, 202, 276(a), and 416 create a federal right in favor of
18 plaintiff to pursue refunds wrongfully not paid by defendant in violation of the FCC *Bureau*
19 *Waiver Order*. The clear intent of the statutes is to create such a right. Additionally, such an
20 implied right is consistent with the underlying purpose of the FCC *Bureau Waiver Order* and
21 47 U.S.C. § 201, et seq. Finally, plaintiff's right to refunds is not traditionally relegated to state
22 law.

23 24. Plaintiff has an implied right to pursue damages for unpaid refunds, as a
24 result of defendant's violation of the FCC *Bureau Waiver Order* and 47 U.S.C. §§ 201, 202,
25 276(a), and 416.

1 **VI. THIRD CAUSE OF ACTION**
2 **UNJUST ENRICHMENT**

3 25. Plaintiff incorporates and restates the foregoing paragraphs of this
4 complaint.

5 26. Defendant has benefited at the expense of plaintiff. Defendant knew of
6 the benefit and the circumstances are such that allowing defendant to retain the benefit would be
7 inequitable to plaintiff.

8 27. Plaintiff demands a trial by jury.

9 **VII. PRAYER FOR RELIEF**

10 28. WHEREFORE, the plaintiff prays for judgment as follows:

11 a. For judgment pursuant to 47 U.S.C. §§ 201, 202, 206, 207,
12 276(a), 407, and 416 for plaintiff's damages in an amount to be proven at the time of
13 trial.

14 b. For attorney fees pursuant to 47 U.S.C. §§ 206 and 407 and
15 as otherwise allowed by law.

16 c. For interest and costs, as allowed by law and/or equity.

17 d. For whatever relief the Court deems just and equitable.

18 DATED this ____ day of December, 2003.

19 MILLER NASH LLP

20
21 _____
22 James L. Phillips
23 WSB No. 13186
24 Brooks E. Harlow
25 WSB No. 11843

26 Attorneys for Plaintiff